

**BEFORE THE HARYANA REAL ESTATE REGULATORY  
AUTHORITY, GURUGRAM**

Complaint no. : 1535 of 2019  
First date of hearing : 14.02.2019  
Date of decision : 14.02.2019

1. Mrs. Praveen Anand  
2. Mr. Dhruv Anand  
R/o: House no. 612, Green Heavens, Plot no. 35,  
Sector-4, Dwarka, New Delhi-110078

**Complainants**

Versus

M/s Selene Constructions Ltd.  
Office: M62 & 63, Connaught Place,  
New Delhi-110001  
Also at: 448-451, Indiabulls House, Udyog  
Vihar Phase V, Gurugram

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Devinder Kumar  
Shri Rahul Yadav

Husband of the complainant  
Advocate for respondent

**ORDER**

1. A complaint dated 20.11.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) rules, 2017 by the complainants Mr. Praveen Anand and Mr. Dhruv Anand, against M/s Selene

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Constructions Ltd., on account of violation of flat buyer's agreement executed on 02.09.2014 in respect of flat/unit described below in the project 'Indiabulls Centrum Park', for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid.*

2. Since, the flat buyer's agreement has been executed on 02.09.2014 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Indiabulls Centrum Park", Village Daulatabad, Sector 103, Gurugram, Haryana
2.	Project area	22.062 acres
3.	RERA Registered/ not registered.	<b>Registered</b>
4.	HRERA registration number	<b>11 of 2018 for phase I</b> <b>10 of 2018 for phase II</b>
5.	HRERA registration certificate valid upto	<b>31.07.2018 for phase I</b> <b>31.10.2018 for phase II</b>



6.	Occupation certificate for tower G1 G2, G3 and B	<b>31.05.2018</b>
7.	Flat/unit no.	G1073, 7 <sup>th</sup> floor, tower-G1
8.	Unit measuring	2875 sq. ft.
9.	Offer of possession	11.02.2019
10.	Flat buyer's agreement executed on	02.09.2014
11.	Total sale consideration	<b>Rs. 1,59,80,625/-</b>
12.	Total amount paid by the complainant	<b>Rs. 48,06383/-</b>
13.	Payment plan	Possession linked plan
14.	Due date of delivery of possession as per clause 21 of the said agreement (3 years from the date of execution of the agreement + 6 months grace period)	02.03.2018
15.	Delay in handing over possession till offer of possession	11 months and 9 days
16.	Penalty clause as per buyer's agreement	Clause 22 of the agreement i.e. Rs.5 per sq. ft of the super area per month for the period of delay

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A flat buyer's agreement dated 02.09.2014 is available on record for the aforesaid unit according to which the possession of the said unit was to be delivered by 02.03.2018 and the possession was offered to the complainants on 11.02.2019.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance.

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the case came up for hearing on 14.02.2019. the respondent through its counsel appeared and the reply filed on behalf of the respondent and has been perused.

### **Facts of the complaint**

6. The complainants submitted that on 15.04.2014 they applied for provisional reservation of residential apartment in centrum park, sector-103 Gurugram to the respondent, under 30:70 plan of payment. On 31.07.2014 M/s Selene Construction Ltd. sent provisional letter of allotment of flat, vide no. CPG/IBCP/01928/07/204.
7. The complainants submitted that buyer's agreement was executed on 02.09.2014 and as per clause 21 the unit was to be handed over within a period of 3 years + 6 months grace period.
8. The complainants submitted that the possession of the said unit was not handed over to them. During June-Aug 2018, a number of telephonic calls were made at customer care centre of respondent company for enquiring about giving the possession of flat every time reply was that occupation certificate is likely to be received anytime.



9. The complainants submitted that on due to uncertainty complainants decided to withdraw the application for allotment of flat and accordingly asked for refund via e-mail of Rs.48,06,383/-.

10. The complainants submitted that on 12.09.2018 application for withdrawal of flat was filed with the office of respondent. The complainants submitted that number of emails were sent to the respondent company including one personal visit.

11. The complainants submitted that on 23.09.2018 meeting was held between complainant and respondents refused to refund the amount.

12. The complainants submitted that on 24.10.2018 complaint was filed in RERA..

**13. Issues raised by the complainants**

- i. Whether the respondent company is liable to refund the entire amount along with rate of interest?

**14. Relief sought**

The complainants are seeking the following relief:

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- i. Pass a direction to respondent company for making refund of principal amount of Rs.48,54,933/- together with interest at SBI MCLR rate plus 2% till 31.10.2018 to us within specified time, as may be adjudicated by hon'ble RERA, Haryana, Gurugram.

**Reply on behalf of respondent**

15. The respondent submitted that he denies the contents of the instant complaint in its entirety, except to the extent admitted specifically hereinafter. Without prejudice to the above, it is respectfully submitted that the instant complaint is a gross abuse of the process of law and has been filed by the complainants with the sole purpose of harassing and pressurizing him to submit and succumb to the unreasonable and unwarranted demands/ claims of the complainants. Without prejudice to the foregoing, it is respectfully submitted that the instant complaint is not maintainable in law and is liable to be dismissed at the threshold, *inter alia*, in light of the following preliminary objections and submissions, which are taken in addition and without prejudice to one another.

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16. The respondent submitted that the instant complaint filed by the complainants is not maintainable, on facts or in law, and is as such liable to be dismissed/ rejected at the thresh hold, being filed under the provisions of RERA Act 2016, which are beyond the preview and scope of this hon'ble authority. Hence the instant complaint is liable to be dismissed. The present complaint is devoid of any merits and has been preferred with the sole motive to harass him. In fact the present complaint is liable to be dismissed on the ground that the said claim of the complainants are unjustified, misconceived and without any basis as against him. The present complaint is baseless and flagrant abuse of process of law to harass him.

17. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. He denies them *in toto*. Nothing stated in the said complaint shall be deemed to be admitted by him merely on account of non-transverse, unless the same is specifically admitted herein. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract

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monies from him hence the same is liable to be dismissed *in limini*. The instant complaint filed by the complainants is outside the preview of this hon'ble authority as the complainants themselves approached him and showed their interest to book unit in the project to be developed by him. Thereafter the complainants post understanding the terms and conditions of the agreement(s) had voluntarily executed flat buyer agreement (hereinafter referred as "FBA") with the him on 02.09.2014. It is submitted that as per the FBA /agreement duly executed between the complainants and him, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. He craves leave of this hon'ble authority to refer and rely upon the clause no. 49 at page 51 of the complaint is being reproduced hereunder for ready reference:

*"Clause 49 All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyers agreement including the interpretation and validity of the terms thereof and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be*

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*settled through Arbitration. The arbitration shall be governed by Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi / Gurgaon and it shall be held by a sole arbitrator who shall be appointed by the Developer and whose decision shall be final and binding upon the parties. The Buyer hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the Developer or is otherwise connected to the Developer and the Buyer confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said Arbitrator. The courts in New Delhi alone shall have the jurisdiction.*

Thus in view of above section 49 of FBA, it is humbly submitted that, the dispute, if any, between the parties are firstly arising out of the said duly executed FBA and it was specifically agreed to refer the dispute, if any, qua the agreement to arbitration. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this hon'ble authority. Moreover no cause of action ever arose in favor of the complainants and against him. Further the hon'ble authority has no Jurisdiction to entertain the present complaint and decide the same hence the present complaint filed by the complainant is liable to be dismissed on the very same ground.

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18. The respondent submitted that the relationship between the complainants and him is governed by the document executed between them i.e. FBA dated 02.09.2014. It is pertinent to mention herein that the instant complaint of the complainants are further falsifying their claim from the very fact that, the complainants have filed the instant claim on the alleged delay in delivery of possession of the provisionally booked unit however the complainants with malafide intention have not disclosed, infact concealed the material fact from this hon'ble authority that the complainants have been a wilful defaulter since the beginning, not paying their instalments on time as per the construction link plan opted by them. It is stated that the complainants have not come before this hon'ble authority with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint. It is pertinent to mention here that from the very beginning it was in the knowledge of the complainants, that there is a

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mechanism detailed in the FBA which covers the exigencies of inordinate delay caused in completion and handing over of the booked Unit i.e. enumerated in the "clause 22" of duly executed FBA, which is at page 42 of the FBA filed by the complainants along with the complaint. He carves leave of this hon'ble uthority to refer and rely upon the clause 22 of FBA which is being reproduced hereunder for ready reference:

*"Clause 22: In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay ....."*

It is thus prayed, that the complainants being aware, having knowledge and having given consent to the incorporation of the above mentioned clause, are now evading from the truth of its existence and does not seem to be satisfied with the amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

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19. The respondent submitted that it is only after being satisfied with the project in totality the complainants expressed their willingness to book a unit in the project looking into the financial viability of the project and its future monetary benefits got the said unit booked with him. He has already completed the construction of the "tower G " and has already applied for grant of occupational certificate for the said Tower. The delay in delivering the possession of the flat to the complainants was beyond the control of him, since for completing a project number of permissions and sanctions are to be required from numerous Government Authorities which were delayed with no fault of him, in addition to the problems related to labour/ raw material and Government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-NCR for several months, it kept on the work moving steadily. That based upon the past experiences he has specifically mentioned all the above contingencies in the FBA dated 02.09.2014 and incorporated them in "clause 39" of FBA at page 47 annexed with the complaint by the complainant

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20. The respondent submitted that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 02.09.2014 executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA Rules, 2017. Further the adjudication of the instant complaint for the purpose of granting interest and compensation, as provided under RERA ACT, 2016 has to be in reference to the agreement for sale executed in terms of said Act and said Rules and no other agreement, whereas, the FBA being referred to or looked into in this proceedings is an agreement executed much before the commencement of RERA and such agreement as referred herein above. Hence, cannot be relied upon till such time the new agreement to Sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA, Act 2016.

21. The respondent submitted that he has made huge investments in obtaining requisite approvals and carrying on the construction and development of 'Indiabulls Centrum

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Park' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers / customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities, still the construction of the project 'Indiabulls Centrum Park' has never been stopped or abandoned and has now reached its pinnacle in comparison to other Real Estate Developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.

22. The respondent submitted that that a bare perusal of the complaint will sufficiently elucidate that the complainants have miserably failed to make a case against him. It is





submitted that the complainants has merely alleged in his complaint about delay on part of him in handing over of possession but have failed to substantiate the same. The fact is that he has been acting in consonance with the duly executed FBA dated and no contravention in terms of the same can be projected on him.

### **Determination of issues**

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

23. With respect to the **sole issue raised by the complainants**, the authority came across clause 21 of flat buyer's agreement dated 02.09.2014. the possession of the flat was to be handed over within 3 years from the date of execution of the agreement + 6 months grace period. Therefore, the due date is computed from 02.09.2014. due date of possession comes out to be 02.03.2018 and the possession was offered to the complainants on 11.02.2019. therefore, the possession has been delayed by 11 months 9 days till the date of offer of possession, thereby committing breach of the said agreement.

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24. Therefore, the promoter has failed to fulfil its obligation under section 11(4) of the Act *ibid*. As the respondent has already obtained OC from the concerned authority and thereafter, the respondent has offered possession on 11.02.2019, the prayer of refund cannot be allowed.
25. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. Therefore, as per proviso to section 18(1) read with rule 15 of the Rules *ibid*, the complainants are entitled to prescribed rate of interest i.e. State Bank of India highest marginal cost of lending rate plus two percent, per annum. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter on the due date of possession i.e. **02.03.2018** till the date of offer of possession i.e. 11.02.2019.

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### Findings of the authority

26. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.
27. For the issue of arbitration clause raised by the respondent, the amendment of section 8 of the Arbitration and Conciliation Act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration

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even if the agreement between the parties had an arbitration clause.

28. Further, in **Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015**, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.
29. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter under section 11(4) of the Act *ibid*. The complainants requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation.
30. The possession of the booked unit was to be handed over to the complainants on 02.03.2018.
31. Occupation certificate has been received by the respondent and delivery of possession has been offered to the complainants on 11.02.2019.

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32. Since the offer of possession has been given to the complainants, as such complainants are directed to take over possession of the unit within one month.

33. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the promoter from the due date of possession i.e. **02.03.2018** till the date of offer of possession i.e. **11.02.2019**.

#### **Decision and directions of the authority**

34. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the parties in the interest of justice and fair play:

- (i) The respondent shall be liable to pay interest for every month of delay at prescribed rate i.e. 10.70% p.a. from

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due date of possession i.e. 02.03.2018 till the offer of the possession to the allottee i.e. 11.02.2019

(ii) The complainants are directed to take over the possession of the unit within one month.

35. The complaint stands disposed of.

36. File be consigned to the registry.

  
(Samir Kumar)  
Member

  
(Subhash Chander Kush)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2019

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Judgement uploaded on 06.08.2019